IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 519 OF 1988

Changdeo Kondiba Gajre. .... Appellant.

Versus.

Bhimrao Daji Bagal. .... Respondent.

Smt.Anjali Helekar for Shri B.P.Apte for the Appellant.

Shri A.Moghe for Shri Avinash Shivde for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 5th August, 2004.

ORAL JUDGMENT.

1. On 30th November 1988 this Court admitted the Second Appeal by passing the following order:

> "Mr.Apte is heard. He contends that the Courts below have accepted a perverse story viz. that an agricultural labourer could in the course of 5 years extract more than Rs.8000/- from his master. Next he submits that the debt stood extinguished under Maharashtra Debt Relief Act 1975. These are substantial questions of law and I therefore admit the Appeal."

I have heard the learned Counsel appearing for the parties on the aforesaid substantial questions of law. When the hearing of the appeal commenced on 3rd August 2004, I indicated to the Counsel appearing for the parties that the Second Appeal will have to be heard on the following additional substantial question of law:

> "Whether the documents at Exhibits 45, 46 and 47 can be read in evidence inasmuch as the contents of the said documents are not proved?"

I have framed the said substantial question of law by exercising power under the proviso to sub-section (5) of section 100 of the Code of Civil Procedure, 1908. I have given an opportunity to the learned Counsel appearing for the parties to make submissions on the said additional substantial question of law.

2. The Appeal is by the Defendant. The Respondent s the original Plaintiff. The case of the Respondent is that he is the owner of certain agricultural lands and the Appellant was employed by him as agricultural labourer/servant for cultivating the agricultural land. The case is that the Respondent agreed to pay Rs.650/- per year to the Appellant as salary. Further case of

the Respondent is that he allowed the Appellant to use his bullocks and agricultural implements without charging any amount. The case of the Respondent is that the Appellant started working from 23rd June 1972 and he obtained advances from time to time from the Respondent and in fact he took more amount from the Respondent than what was payable to him on account of salary. It is pleaded by the Respondent that on 14th November 1977 an account was taken and it was found that a sum of Rs.8198.22 ps. is due and payable by the Appellant to the Respondent. Further case made out by the Respondent is that on the same day a writing was executed by the Appellant by which the Appellant agreed to pay the said amount. The Respondent stated that the Appellant affixed revenue stamp of 20 paise below the said writing and affixed his thumb impression thereon. The Respondent stated that legal notice dated 22nd June 1978 sent by his Advocate was duly served on the Appellant and no reply was sent by the Appellant. Therefore, suit was filed by the Respondent for recovery of the amount with interest at the rate of 12% per annum.

3. The suit was resisted by the Appellant by filing written statement. The Appellant denied that he was liable to pay any amount to the Respondent. His case is that the agreed salary was Rs.1100/- per year for first two years and thereafter salary was to be enhanced to

Rs.1400/- per year. The Appellant denied that an account was taken and that any writing was prepared. It is his case that the Respondent represented to the Appellant that he was desirous of preparing account and therefore, thumb impressions of the Appellant were obtained on blank documents.

4. The trial Court decreed the suit and the decree passed by the trial Court is confirmed in appeal preferred by the Appellant. Hence this Second Appeal is preferred by the Appellant.

5. The learned Counsel appearing for the Appellant submitted that the findings recorded by both the Courts below are perverse. The learned Counsel submitted that perusal of the documents at Exhs.45 to 47 shows that the same are obviously got up documents. Further submission of the learned Counsel for the Appellant is that the contents of the documents were not proved by examining the scribe of the document and therefore, the same could not have been read in evidence. She submitted that considering the fact that the Appellant was an agricultural labourer it is impossible to believe that a sum of Rs.8217.73 is due and payable by the Appellant to the Respondent.

6. The learned Counsel appearing for the Respondent

submitted that there are concurrent findings of fact recorded by the Courts below which do not call for interference under section 100 of the said Code. He submitted that the Courts below have recorded the findings which are based on evidence on record.

7. I have considered the rival submissions. I have perused the documents at Exh.45 and 46. The said documents are note books in which an account of various amounts allegedly paid by the Respondent from time to time to the Appellant is maintained. Exh.47 is the writing under which the Appellant allegedly agreed to pay a sum of Rs.8198.22 to the Respondent. In the examination-in-chief, the Respondent has stated that the account books at Exhs.45 and 46 are maintained under his supervision by one Ramchandra Ravji Pawar and the accounts are in the hand writing of the said Pawar. He stated that apart from the said Ramchandra Pawar, one Bhagwat Gajre and one Audumbar Sutar were also present when the account was taken. The case of the Respondent is that the writing at Exh.47 is also written by Ramchandra Pawar. In the cross-examination of the Respondent the theory of taking account is specifically challenged. There is a challenge to the entries made in the account books at Exh.45 and 46. The Respondent admitted that the accounts are not part of Rojmel (daily balance) and that the wages payable to the Appellant are

not credited in his name. There is a specific cross-examination of the Respondent made by the Advocate for the Appellant on the document at Exh.47. The suggestion given to the Respondent is that the documents at Exhs.45 and 46 have been prepared subsequently. A suggestion was given that the document at Exh.47 is sham and bogus. The Appellant stepped into the witness box and denied that there was any account taken as alleged by the Respondent on 14th November 1977 and denied that any writing was executed which is at Exh.47. Perusal of the cross-examination shows that the contents of the documents at Exh.45 to 47 are not put to the Appellant.

8. It is true that all the three documents have been marked as Exhibits. In this behalf it is necessary to refer to the judgment of the learned Single Judge of this Court reported in 2004 (3) Bombay Cases Reporter page 509 (Bama Kathari Patil v/s.Rohidas Arjun Madhavi & anr.) The learned Single Judge held :

> "Exhibiting of a document is an administrative act. It is true that a document which is produced in Court is ordinarily exhibited only after its proof. But, exhibiting a document does not mean that the document is proved and non-exhibiting a document does not mean

> that the document is not proved. A document is required to be proved in accordance with the provisions of the Evidence Act. Merely for administrative convenience of locating or identifying a document, it is given an exhibit number in Courts. Exhibiting a document has nothing to do with the proof though, as a matter of convenience, only the proved documents are exhibited.
>
> . It is therefore open to the petitioner defendant to contend at the stage of arguments that the agreement though exhibited, has not been proved by the plaintiff in accordance with law."

It is therefore clear that merely because the documents are exhibited it cannot be said that the contents of the documents are proved. In so far as Exh.47 is concerned, what is proved is the thumb impression. If the documents at Exh.45 and 46 are perused, it appears that there is some substance in the arguments advanced before the Courts below that the note books appear to have been written on the same day in the same handwriting. However, this being the Second Appeal under section 100 of the said Code, I am not considering the said

submission. It is to be noted that the Appellant has denied in the Written Statement itself the correctness of the case of the Respondent that the account was taken on 14th November 1977 and that a writing was executed. In the plaint though writing dated 14th November 1997 is specifically referred to, there is no reference to any account books having been maintained. It is pertinent to note that altogether a new case was allowed to be made out in the evidence of the Respondent that entries were made in the account books by the Appellant recording therein the amounts allegedly advanced from time to time to the Appellant. A case is made out for the first time that the accounts are maintained in the hand writing of Ramchandra Pawar. As stated in the cross-examination, there was a specific challenge to the said account books by giving suggestion that the same are prepared subsequently. In my view the contents of the account books could have been proved only by examining the said Pawar. The account books do not bear any thumb impression of the Appellant or the signature of the Respondent. Therefore, the account books at Exhs.45 and 46 should have been proved only by examining Ramchandra Pawar in the absence of any admission by the Appellant as regards the contents of the said account books. Therefore, in my view, the documents at Exhs.45 and 46 could not have been read in evidence by the Courts below. The entire case of the Respondent is

based on the account allegedly taken on 14th November 1977. The account is taken on the basis of the entries in the said account books. In the circumstances, the entire case of the Respondent ought to have been discarded in the absence of clear proof of the contents of the documents at Exhs.45 and 46.

9. In so far as Exh.47 is concerned, the case of the Appellant is that his thumb impression was obtained on a blank paper. The Respondent has deposed that Ramchandra Pawar is the scribe of the said writing at Exh.47. Non examination of the said Pawar is very relevant so far as this document is concerned. For the purpose of proving the contents of the the document, examination of said Ramchandra Pawar was required. However, the Respondent has failed to examine the said Ramchandra Pawar or the other two persons who were allegedly present at the time of taking account. Thus both the Courts below appear to have proceeded on the erroneous assumption that the execution and contents of the said three documents have been proved. As held by this Court merely because the document is marked as exhibit, it does not mean that the document is duly proved. The document is required to be proved in accordance with the provisions of the Indian Evidence Act, 1872.

10. The Apex Court has held that non interference with

the concurrent findings of fact in an Appeal under section 100 of the said Code is not an absolute rule. If the documents which are not admissible in evidence are read in evidence, this itself raises a substantial question of law. The Apex Court in the Judgment reported in (1999) 3 S.C.C. page 722 (Kondiba Dagadu Kadam v/s. Savitribai Sopan Gujar and others) held that in Second Appeal the High Court cannot substitute its own opinion for that of the first Appellate Court unless it finds that the conclusions drawn by the Courts below were erroneous being based on the inadmissible evidence or no evidence. Merely because some erroneous finding of fact has been recorded the same will not call for interference in an appeal under section 100 of the said Code, but when the findings are based on the documents which are inadmissible in evidence, section 100 of the Code would certainly be attracted. In the circumstances the findings of fact recorded by both the Courts below being based on the documents which are inadmissible in evidence are required to be set aside. In this view of the matter, the Second Appeal must succeed. According the Second Appeal is allowed. The impugned Judgements and Decrees are quashed and set aside, and the Civil Suit filed by the Respondent is dismissed.

Judge.